No. 19-35308

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Rentberry, Inc., and Delaney Wysingle,

Plaintiffs – Appellants,

v.

The City of Seattle,

Defendant – Appellee.

On Appeal from the United States District Court
for the Western District of Washington
Honorable Richard A. Jones, District Judge

Appellants' Opening Brief

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned attorney for Appellant Rentberry, Inc., certifies that Rentberry has no parent company and no publicly held company holds any stock in Rentberry.

DATE: August 16, 2019. Respectfully submitted,

s/ ETHAN W. BLEVINS

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INTRODUCTION

A few startups in 2017 began offering an innovative feature on rental listing platforms that allowed tenants to place bids on listings. The City of Seattle slapped a moratorium on the use of these platforms without evidence of harm. The City's overzealous reaction to this new platform for speech does not satisfy First Amendment scrutiny.

The district court held that Rentberry, a web platform that offers the forbidden rental bidding services, and Delaney Wysingle, a landlord who wishes to use rental bidding to advertise his property, do not have standing to challenge a law that directly silences them. Wysingle made clear his intent to use rental bidding for advertising his rental unit during the summer of 2018, a plan that he still cannot fulfil thanks to Seattle's moratorium. He is suffering a concrete injury worthy of federal court resolution.

The court below also held that the moratorium on rental bidding restricts conduct, not speech. But bidding is communication about price in anticipation of a transaction. A ban on bidding thus regulates speech, not the business transaction itself.

The moratorium cannot survive the intermediate scrutiny demanded of commercial speech regulations. The City passed the moratorium based on speculation and conjecture, the moratorium does not serve the government's asserted

interests, and the moratorium is more extensive than necessary because there are ways to address the availability of housing without limiting speech. Seattle's strategy of shutting down speech as a first resort does not comport with the First Amendment.

STATEMENT OF JURISDICTION

Pursuant to 28 U.S.C. § 1331, the federal district court had subject matter jurisdiction over this dispute arising under the United States Constitution. On March 15, 2019, that court issued an order granting summary judgment to the City and entered final judgment on March 18, 2019. Plaintiffs filed a timely notice of appeal on April 16, 2019, within 30 days of the final judgment as required by Rule 4 of the Federal Rules of Appellate Procedure. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE CASE

The Bidding Moratorium

On March 19, 2018, the Seattle City Council enacted a "one-year prohibition on use of rental housing bidding platforms." ER 17; *see also* Seattle Municipal Code (SMC) § 7.24.090(B). During that year, "[l]andlords and potential tenants are prohibited from using rental housing bidding platforms for real property located in Seattle city limits." *Id.* § 7.24.090(A). This rental bidding moratorium defines a "rental housing bidding platform" as "a person that connects potential tenants and landlords via an application based or online platform to facilitate rental housing auctions wherein potential tenants submit competing bids on certain lease provisions

including but not limited to housing costs and lease term, to landlords for approval or denial." *Id.* § 7.24.020. The ban went into effect on April 29, 2018.

The Ordinance calls upon city agencies to investigate whether bidding platforms comply with fair housing laws and what impact such platforms might have on "equitable access to Seattle's rental housing market." Excerpts of Record (ER) 19. The results of the study were to be submitted to the City Council before the ban expired. *Id.* If, however, the city departments requested more time to complete the study or the City Council needed more time to review it, the Council was allowed to extend the one-year ban for another year. SMC § 7.24.090(C).

The original Ordinance expressly conceded that the City "has not … studied" whether rental bidding platforms harm the rental housing market or defy local regulations. ER 17. The Ordinance noted only that "it is unclear whether ... these new services comply with the City's code, including new regulations such as first-in-time." *Id*. The City's only specific reference to a regulation is the first-in-time rule struck down as unconstitutional in King County Superior Court in March 2018. *Id.*; *see also Yim v. City of Seattle*, Case No. 17-2-05595-6 (King Cty. Sup. Ct. 2018), ER 23-32.[1] The City also confessed that "it is uncertain whether and how these

[1] The Washington Supreme Court heard oral argument on direct review on June 11, 2019.

services impact Seattle's rental housing market, as these services may have different effects on markets depending on the scarcity of housing supply." ER 17.

This absence of evidence did not dissuade the Council from taking drastic action. The City banned the use of the platforms until it decides at its leisure whether it will allow landlords and tenants to communicate on rental bidding platforms. The Ordinance says, "[T]he Council wishes to understand new technologies and innovation that may have impacts on communities throughout Seattle prior to these new technologies and innovations becoming entrenched without regard to whether their impacts are in line with Seattle's values of equity and Seattle's work toward expanding access to rental housing." ER 18. Thus, "the Council wishes to know more about how these services function and the impact they may have on Seattle's rental housing market before allowing landlords and tenants to use them within the City." ER 18. A city staff memo to a committee of the Council says the moratorium serves three purposes: "(1) to study whether these types of services are compliant with the City's current laws; (2) to give the City time to create a regulatory framework if necessary before use of such services proliferates; and (3) to determine current and potential impacts on Seattle's Housing Market." ER 34. The memo identified two websites as targets of the ban: Rentberry and Biddwell. *See id.*

The initial moratorium expired at the end of April 2019, with no study completed. Instead of opting to renew the moratorium as allowed by the Ordinance,

the City Council passed a substantially similar moratorium on June 10, 2019, which took effect on July 17, 2019. *See* Supp. App. 001; SMC § 1.04.020(A) (establishing effective dates of ordinances). The Council Bill passed by the City Council was virtually identical to the prior Ordinance, including the findings regarding the City's uncertainty about rental bidding's impact on housing or compliance with local law. *See* Supp. App. 004. Differences are minimal: in the findings and whereas provisions, the Bill noted this litigation and claimed that the "Office of Housing is conducting the study on rental housing-bidding and estimates it will be completed in June 2019."[2] *Id.* Otherwise, the law itself is identical to the moratorium that was the original object of this litigation. *See id.* at 006. Importantly, this means that the law contains yet another one-year extension option, even though the study mandated by the City was complete before the new moratorium took effect. *See id.* at 007.

Plaintiffs

1. Rentberry

Rentberry is a rental listing platform that facilitates communication about housing and related services. ER 44. Rentberry's technology is designed to simplify and reduce the costs of the rental process. ER 44. Rentberry employs various innovations designed to bring fresh technology to the rental industry. ER 44.

[2] In fact, as discussed below, the Office of Housing issued its rental bidding report on July 3, nearly one month after the renewed moratorium was enacted. Supp. App. 013.

One such innovation is Rentberry's proprietary bidding technology. ER 45. This helps landlords respond to changes in the rental market, while potential tenants can easily communicate the price they are willing to pay and see competing offers. ER 45. The bidding feature reduces delay, inefficiency, and uncertainty in the rental process. ER 46.

The platform allows landlords to post asking prices for rent and security deposit and solicit bids. ER 45. Applicants can communicate their bid above or below the asking prices. ER 45. Rentberry utilizes an algorithm to communicate a recommended bid to applicants, based on market conditions. ER 45. A user can see details about the highest bid, as well as various characteristics about the high bidder, such as their credit score, their monthly salary, whether they have pets, and the number of roommates. ER 51-52. They can also see the average credit score of individuals interested in that property, as well as an estimation of the overall demand for that unit. ER 45. Landlords can view all bids submitted and application details, including background check information provided by Rentberry. ER 52. The bidding feature is an integral component of Rentberry and landlords listing property on Rentberry cannot post a fixed price or refuse to allow bids. ER 45. Landlords retain the right to select any bidder or no bidder. ER 45.

Rentberry's website provides a search engine that allows registered users to filter searches for housing by price range, housing type, number of bedrooms,

amenities, and so on. ER 46. Search results display customized advertisements posted by landlords, which can include photographs, descriptions, and rental criteria. ER 46. After finding a desirable listing, potential tenants submit their bids and complete the application process on the Rentberry site. ER 49. Rentberry also provides a forum for landlord-tenant communication, maintenance requests, and rent payment. ER 46.

2. Delaney Wysingle

Delaney Wysingle owns and rents out a single-family home in Seattle. ER 41. After inheriting the home in 2015, he rented it out to a single tenant from June 2015 to February 2018. ER 41. He then renovated the house from March through August 4, 2018, during which time the house was vacant. ER 42. If not for the moratorium, Wysingle would have advertised his property and selected his next tenant through a rental bidding platform. ER 42. Instead, he used Zillow to find a tenant who has occupied the property from August 2018 to the present. ER 42. Wysingle renewed the current lease in June 2019 rather than advertising the property, in part due to his inability to make use of all available advertising platforms because of the moratorium. Supp. App. 0046.

The current lease term on Wysingle's property terminates on June 30, 2020, several weeks before the moratorium's expiration. *See* Supp. App. at 46. If the current lease is not renewed, Wysingle wants to use Rentberry, including the bidding

feature, to advertise his property in advance of the June lease termination. *Id.* He cannot do so, however, because the moratorium will be in effect at that time. *See id.* at 46. Wysingle wants to experiment with rental bidding platforms because he believes they help landlords and tenants to settle on rent based on fair market value. ER 42. Wysingle would be willing to accept a bid below his asking price if the applicant seemed qualified. ER 42.

Trial Court Decision

The parties filed cross-motions for summary judgment in late 2018. On March 15, 2019, the district court issued an order granting the City's motion. The court held that plaintiffs lacked standing to bring a First Amendment claim, and the First Amendment was not implicated because the moratorium regulated conduct, not speech.

Rental Bidding Report

On July 3, 2019, the Office of Housing issued the report on rental bidding platforms mandated by the Ordinance. *See* Supp. App. 013-024. The eleven-and-a-half page report draws no conclusions about either rental bidding platforms' compliance with other laws or whether rental bidding platforms will inflate housing costs. *See id.* Despite the report's lack of conclusive evidence, the report recommended that the City modify the moratorium "to be effective in perpetuity, or

until rental bidding platforms can affirmatively demonstrate compliance with all federal, state and local laws, and fair and equitable operations." *Id.* at 024.

ARGUMENT

I. Wysingle has standing to press his First Amendment claims

To establish standing, a plaintiff must show that he has (1) suffered a concrete and particularized injury in fact that is actual or imminent, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Plaintiffs may establish injury-in-fact before suffering direct injury from the challenged restriction. *See id.*

This Court has held on many occasions that "First Amendment cases raise 'unique standing considerations' … that 'tilt[] *dramatically* toward a finding of standing.'" *Lopez v. Candaele*, 630 F.3d 775, 781 (9th Cir. 2010) (emphasis added, citations omitted). In First Amendment cases, facial constitutional challenges come in two varieties: First, a plaintiff seeking to vindicate his own constitutional rights may argue that an ordinance is "unconstitutionally vague or . . . impermissibly restricts a protected activity." *Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998). Second, "an individual whose own speech or expressive conduct may validly be prohibited or sanctioned is permitted to challenge a statute on its face because it also threatens others not before the court." *Hunt v. City of Los Angeles*, 638 F.3d

703, 710 (9th Cir. 2011). The first type of challenge "may be paired with the more common as-applied challenge, where a plaintiff argues that the law is unconstitutional as applied to his own speech or expressive conduct." *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1033-34 (9th Cir. 2006) (citations omitted); *see also Foti*, 146 F.3d at 635.

Wysingle satisfies standing because he has concrete plans to use a platform the moratorium prohibits. The moratorium prevents Wysingle from soliciting for bids. Supreme Court caselaw recognizes that the First Amendment's protection is afforded "to the communication, to its source and to its recipients both." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756 (1976). As this Court held in *Conant v. Walters*, 309 F.3d 629, 643 (9th Cir. 2002), "[t]he right to hear and the right to speak are flip sides of the same coin." The moratorium impacts both sides of the coin.

Wysingle plainly expressed his "goal is to use the bidding platform." ER 58. He had a concrete plan to advertise his property in the summer of 2018, as soon as renovations were completed August 4, but the moratorium barred him from doing so on Rentberry, as he'd wished. ER 57. Confirming his clear intent, Wysingle made multiple visits to Rentberry's website and telephone calls to Rentberry staff, all in an effort to understand how to use the platform so that he could "give the bidding process a try." ER 59-62. He also described multiple features that he wished to use,

including the bidding feature. ER 61. Also, despite understanding that it would be fruitless, Wysingle created a Rentberry account and tested whether he could post his property; he was rebuffed, as expected, because of the moratorium. Supp. Wysingle Decl. ¶ 7-9, Supp. App. 047-48. All told, Wysingle plainly demonstrated a concrete intent to use Rentberry but for the challenged Ordinance.

The district court erroneously concluded that Mr. Wysingle lacked standing because he "was not a member of Rentberry and his rental house was under renovations." ER 6.

Yet Rentberry is not a "membership" organization; it is an online service provider. Even so, Wysingle did not need to create login credentials to establish standing. Seattle explicitly prohibits both "landlords and potential tenants" from "using rental housing bidding platforms for real property located in Seattle city limits." SMC § 7.24.090(A). Thus, it would be an act of futility for Wysingle to "join" or establish login credentials for Rentberry if neither he nor prospective tenants can legally use its services. Indeed, Wysingle has confirmed the futility of "joining" Rentberry. Supp. Wysingle Decl. ¶ 7-8, Supp. App. 047-48.

Plaintiffs need not engage in futile action to establish standing to sue in federal court. *Taniguchi v. Schultz*, 303 F.3d 950, 957 (9th Cir. 2002) ("[S]tanding does not require exercises in futility."). Thus, in *Desert Outdoor Adver., Inc. v. City of Moreno Valley*, 103 F.3d 814, 818 (9th Cir. 1996), this Court ruled that billboard

operators had "standing to challenge [a] permit requirement, even though they did not apply for permits, because applying for a permit would have been futile. . . . because . . . the ordinance flatly prohibited [their] signs."

Similarly, in *Clark v. City of Lakewood*, 259 F.3d 996, 1006 (9th Cir. 2001), the owner of closed adult businesses established his standing by submitting a declaration stating that "if the Ordinance is declared unconstitutional, 'it is my intent to reopen my business.'" *Id.* at 1008. This sufficed for standing purposes even though Clark's business license had expired; the Court saw no point in forcing him to go through the futile process of applying for a new license. *See id.* The court below disregarded *Clark* because the plaintiff in that case had an operating business before the challenged law closed him down. ER 7. The situation in this case is different: Rentberry represents a new technology—Wysingle could not have used Rentberry prior to the moratorium. The City's decision to restrain Rentberry's platform for speech prior to Wysingle being able to use it only enhances his injury. *See Twitter, Inc. v. Sessions*, 263 F. Supp. 3d 803, 809 (N.D. Cal. 2017) ("Prior restraints on speech are 'the most serious and the least tolerable infringement on First Amendment rights.' *Nebraska Press Ass'n*, 427 U.S. at 559.").

Additionally, in *Food Not Bombs*, 450 F.3d at 1034, and *Arizona Right to Life Political Action Committee v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003), this Court held that standing in First Amendment cases exists where a pre-enforcement

plaintiff shows that he altered his expressive activities to comply with the statute at issue and alleges apprehension that the statute would be enforced against him. *See also Lopez*, 630 F.3d at 790. Wysingle explicitly stated that he wanted to communicate with potential tenants via Rentberry's rent-bidding platform but, reasonably fearing prosecution under the Ordinance, he advertised on Zillow instead.[3] ER 42. It would "turn respect for the law on its head" to hold that a plaintiff lacks standing because he "chose to comply with the statute and challenge its constitutionality." *Bayless*, 320 F.3d at 1007.

Further, the district court's observation that Wysingle "could not say exactly when his rental home would be available" mischaracterizes the evidence and cannot justify depriving him of his day in federal court. *See* ER 6. To be sure, Wysingle testified that he was unsure of an exact date because he was at the mercy of the contractors. ER 56. But he accurately predicted that his property would be available at the end of July 2018, and the property was indeed available within a week of his estimate. *See id.*; ER 42. Wysingle's current tenant's lease expires prior to June 30, 2020, before the Ordinance once again comes up for renewal and Wysingle would

[3] Zillow does not have a bidding feature. *See* Zillow, About Us, https://www.zillow.com/corp/About.htm (visited July 16, 2019).

use Rentberry to solicit bids from prospective tenants, if permitted. Section 7.24.090(C).[4] Supp. App. 046.

Wysingle's plans to rent out his home were not "some day intentions," as the district court called them. ER 7. Indeed, Wysingle had concrete plans that differ markedly from the plaintiffs' plans in *Thomas v. Anchorage Equal Rights Commission*, 220 F.3d 1134 (9th Cir. 2000), the case cited by the district court. *Id.* In *Thomas*, landlords challenged a law forbidding discrimination based on marital status, but the landlords failed to "specify when, to whom, and under what circumstances" they might engage in the unlawful conduct. *Thomas*, 220 F.3d at 1139. *Thomas* only held that standing "requires something more than a hypothetical intent to violate the law." *Id.* In contrast to the landlords in *Thomas*, Wysingle had a concrete plan to rent out his home after renovations were complete, and he predicted accurately that the renovations would be complete toward the end of July 2018. And indeed the property renovations were completed on August 4, 2018. He still has a

[4] The Ordinance was renewed on July 17, 2019, and Section 7.24.090 provides for additional renewal if the City Council "needs more time" to review the study or "discuss potential action." Given the ability of a city council to discuss matters endlessly, the "temporary" moratorium appears quite lengthy, if not permanent, to city landlords and potential tenants. *See, e.g.*, *Bill Salter Advertising, Inc. v. City of Brewton, Ala.*, 486 F. Supp. 2d 1314, 1328-29 (S.D. Ala. 2007) (striking down, on First Amendment grounds, an "ongoing, indefinite moratorium" of "22 months and counting" on billboard construction to allow city to study safety issues after a hurricane because the moratorium extended far longer than necessary to complete the study). Indeed, the Office of Housing has recommended that the moratorium be made permanent. Supp. App. 024.

concrete plan to use Rentberry during June 2020, just before the current lease comes to a close. Supp. App. 046. His behavior and plans demonstrate far more than "hypothetical intent" or "some day intentions."[5]

II. The moratorium violates the First Amendment

Regulations that govern prices or commercial transactions do not restrict speech, but regulations that restrict *communication* about price or a transaction must face intermediate scrutiny. The moratorium restricts such communication because it forbids parties from communicating bids or otherwise expressing themselves on rental bidding platforms. The City must therefore satisfy First Amendment scrutiny.

a. The moratorium restricts speech by banning online bids

The trial court erred in holding that the moratorium does not restrict speech. This error stems from eliding a fundamental distinction between regulations that govern transactions and regulations that restrict *communication in anticipation* of transactions. The moratorium restricts communications about price and therefore falls into the latter category.

[5] Developments that have arisen after the district court's decision have not rendered the case moot. Although the original moratorium challenged by plaintiffs expired, the almost identical moratorium now in place ensures a continuing controversy. *See Fireman's Fund Ins. Co. v. City of Lodi, California*, 302 F.3d 928, 936 n.8 (9th Cir. 2002) (where a city repeals a challenged ordinance and enacts a new, substantially similar ordinance, the challenge is not moot because "the core disputes between the parties remain").

Communication about prices enjoys specific First Amendment protection. In *Virginia State Board of Pharmacy*, for example, the Supreme Court invalidated a state rule that forbade pharmacists from advertising prices. 425 U.S. at 773. The Court held that a state cannot suppress price advertising because of the "information's effect upon its disseminators and its recipients." *Id.* Likewise, in *44 Liquormart v. Rhode Island*, the Supreme Court held that a state law preventing liquor stores from posting prices was a speech restriction. 517 U.S. 484, 495 (1996). And recently, in *Expressions Hair Design v. Schneiderman*, the Supreme Court held that regulations impose a burden on protected speech when they restrict the method that businesses use to communicate about their prices. 137 S. Ct. 1144, 1150-51 (2017).[6]

Speech about pricing merits First Amendment protection because it offers "vital information about the market." *44 Liquormart*, 517 U.S. at 495. Information "as to who is producing and selling what product, for what reason, *and at what price*" is "indispensable" to wise economic decisions. *Virginia State Bd. of Pharmacy*, 425

[6] *See also Nat'l Ass'n of Tobacco Outlets, Inc. v. Providence, R.I.*, 731 F.3d 71, 76-77 (1st Cir. 2013) ("Pricing information concerning lawful transactions has been held to be protected speech by the Supreme Court."); *Spirit Airlines, Inc. v. U.S. Dep't of Transp.*, 687 F.3d 403, 412 (D.C. Cir. 2012) (price advertising is "quintessentially" commercial speech); Felix T. Wu, *Commercial Speech Protection as Consumer Protection*, 90 U. Colo. L. Rev. 631, 644 (2019) ("Pricing information is quintessential commercial speech, because pricing is a key component of any commercial transaction.").

U.S. at 765 (emphasis added). Hence, a consumer's interest in robust commercial speech "often may be far keener than his concern for urgent political debate." *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 566 (2011) (quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977)).

Speech restrictions that stifle reciprocal communication between buyer and seller pose an even greater threat than regulation of a one-way advertisement. *See Va. State Bd.*, 425 U.S. at 756 ("[W]here a speaker exists, . . . the protection afforded is to the communication, to its source and to its recipients both."). For example, in *Edenfield v. Fane*, the Supreme Court addressed a ban on direct solicitation by certified public accountants. 507 U.S. 761, 763-64 (1993). The Court noted the "considerable value" of solicitation because it allowed "direct and spontaneous communication between buyer and seller." *Id.* at 766. Two-way communication between parties is superior to a one-way advertisement because buyer and seller can better negotiate, assess market demand, and reach a fully informed arrangement based on mutual communication. *See id.*

Just like an advertisement or a listed price, soliciting, placing, and receiving a bid are forms of protected speech. As the Supreme Court has repeatedly held, communicating about price is protected by the First Amendment, and that protection does not distinguish between a seller's speech and a buyer's speech. Posting a bid for a rental unit is just as much an act of communication as quoting a price for a

prescription drug in *Virginia State Board of Pharmacy* or advertising the price of alcohol in *44 Liquormart*. *Virginia State Bd. of Pharmacy*, 425 U.S. at 757; *44 Liquormart*, 517 U.S. at 489. Posting a bid is not a business transaction but instead provides valuable information that facilitates an *anticipated* transaction. This is the very definition of speech that "propose[s] a commercial transaction." *Va. State Bd. of Pharmacy*, 425 U.S. at 776. In fact, because bidding involves reciprocal communication, it has stronger communicative content than a unilateral price in advertising. Accordingly, several courts have subjected bidding restrictions to First Amendment analysis. In *Department of Professional Regulation, Board of Accountancy v. Rampell*, the Florida Supreme Court held that a law prohibiting accountants from bidding for work "restricts economic expression constituting commercial speech." 621 So. 2d 426, 428 (Fla. 1993). A federal district court in Florida drew a similar conclusion, holding that an auction is commercial speech rather than conduct because "the activity of 'auctioneering' by its very nature does nothing more than 'propose a commercial transaction.'" *See Jim Gall Auctioneers, Inc. v. City of Coral Gables*, Case No. 97-cv-3186-CIV-SEITZ, Order on Cross-Motions for Summary Judgment at 12 (S.D. Fla. 1999) (quoting *Va. State Bd. of Pharmacy*, 425 U.S. at 762).

The district court below erred in holding that the moratorium "regulates conduct, not speech." ER 10. Bidding is speech. When a law regulates "the

communication of prices rather than prices themselves," that law regulates speech. *Expressions Hair Design*, 137 S. Ct. at 1151. Broad authority to regulate commercial transactions does not include within it the power to directly regulate speech related to those transactions. As the Supreme Court put it in *44 Liquormart*, "[I]t is no answer that commercial speech concerns products and services that the government may freely regulate. . . . [A] State's regulation of the sale of goods differs in kind from a State's regulation of accurate information about those goods." *44 Liquormart*, 517 U.S. at 512. The district court failed to recognize that key difference.

The Supreme Court addressed the difference between regulating a transaction and regulating speech *about* a transaction in *Expressions Hair Design*. The court of appeals had held that a state law restricting credit-card surcharges was a price regulation and therefore did not regulate speech. *Expressions Hair*, 137 S. Ct. at 1148. The Supreme Court disagreed, noting that the law "tells merchants nothing about the amount they are allowed to collect . . . . What the law does regulate is *how* sellers may communicate their prices." *Id.* at 1151 (emphasis added). In the context of bidding, a law that imposed a cap on the highest bid might be an example of a price regulation with an incidental effect on speech. A ban on communicating a bid, however, is a speech regulation, not a regulation of the potential transaction. *See Nordyke v. Santa Clara Cty.*, 110 F.3d 707, 710 (9th Cir. 1997) (law prohibiting

offers to sell firearms at gun shows was a restriction on commercial speech, since the law regulated an offer—which is speech—rather than the sale itself).

On rental bidding platforms, a landlord posts a threshold price and renters post competing bids. These bids, which are visible to both the advertising landlords and other tenant-users, are designed to communicate valuable information for market participants by helping them assess demand for a unit and settle on a reasonable price. Market information like this is vital in our free enterprise system, and bidding is an effective way to convey such information. *See F.E.R.C. v. Electric Power Supply Ass'n*, 136 S. Ct. 760, 774, 776 (2016) (describing market mechanism in auction context). Bidding online, just as in an auction, involves many people expressing their preferences. That expression is protected speech.

Additionally, the moratorium restricts speech beyond just bidding. The law imposes a blanket ban on the use of an entire online platform for residential housing, not just the bidding component. This is clear from the definition of "Rental housing bidding platform," which "means a person that connects potential tenants and landlords via an application based or online platform to facilitate rental housing auctions wherein potential tenants submit competing bids on certain lease provisions." SMC § 7.24.020. Thus, the moratorium extends to the "online platform" "wherein" bidding occurs, not just bidding alone. An "online platform" refers to an entire software or website, not simply one function of the site.

The Ordinance does clarify that "[m]erely publishing a rental housing advertisement does not make a person a rental housing bidding platform." *Id.* This exception, however, does not reach advertisements published on an online platform that otherwise qualifies as a rental housing bidding platform.

The moratorium thus covers an array of speech on these platforms beyond bidding, such as advertising a unit through images and descriptions, use of search engine functions for prospective tenants, communicating about maintenance requests, providing references, and so forth. Moreover, landlords cannot post an advertisement on Rentberry without using the bidding component. ER 45. Thus, even if listing and bidding on a price did not constitute protected expression, the moratorium nonetheless forbids other forms of speech.

The district court, however, only addressed bidding in its holding that the moratorium only regulated conduct. The cases relied upon by the district court merely underscore the essential difference between a law that regulates communication in anticipation of a transaction and regulation of the transaction itself. For example, the district court looked to *Airbnb, Inc. v. City and County of San Francisco*, 217 F. Supp. 3d 1066 (N.D. Cal. 2016), where a federal district court upheld a regulation that prohibited businesses from booking unregistered short-term rentals. But the parties agreed in that case that the challenged regulation "[was] not, on its face, directed to content or speech." 217 F. Supp. 3d at 1073. The plaintiffs

had instead argued that preventing businesses from booking unregistered rentals had an incidental impact on speech because it discouraged people from advertising unregistered units on sites that couldn't legally complete the booking. *Id.* at 1076-77. Hence, the district court held that the ordinance was "directed at commerce or conduct," not expression. *Id.* at 1078.

Likewise, the district court cited a similar short-term rental case, *Homeway.com, Inc. v. City of Santa Monica*, 918 F.3d 676 (9th Cir. 2019).[7] As with the *Airbnb* case, the ordinance at issue prevented hosting platforms from completing a booking transaction for unlicensed properties and forbade collecting a fee for facilitating unlicensed home-sharing. *Id.* at 680. As with *Airbnb*, the court held that this ordinance regulated conduct in the form of booking transactions, not speech in anticipation of a transaction. *Id.* at 685. In contrast to *Airbnb* and *Homeaway*, the moratorium here does not restrict completion of a business transaction like booking a rental or executing a lease—it instead restricts bidding if it occurs on an online platform, which is a recognized form of expression.

The district court also cited a case involving a challenge to a minimum-wage law, *International Franchise Association, Inc. v. City of Seattle*, 803 F.3d 389, 408 (9th Cir. 2015), a case once again addressing the conduct-speech distinction. There,

[7] The district court cited to the district court decision, 2018 WL 1281772, but this Court has since issued a decision on appeal affirming the district court.

Seattle's minimum-wage ordinance differentiated between large and small employers in its incremental compliance schedule, with large employers facing a stricter schedule. *Id.* at 397-98. Franchisees with large networks were considered "large employers" for this purpose. *Id.* The plaintiffs claimed that the definition of a "franchise" subject to the stricter schedule violated the First Amendment because part of the definition included expressive activity, namely that the "operation of the business is substantially associated with a trademark, service mark, trade name, advertising, or other commercial symbol." *Id.* at 408. While noting that the ordinance was "not wholly unrelated to a communicative component," this Court held that the ordinance did not directly regulate the speech component because it "applies to businesses that have adopted a particular business model, not to any message the businesses express." *Id.* at 408-09. Again, the moratorium is notably different. It does not regulate the business transaction of executing a lease agreement—it instead only regulates speech between buyers and sellers in anticipation of a commercial transaction. The moratorium must therefore face at least intermediate scrutiny under the commercial speech doctrine.

b. The moratorium should face strict scrutiny because the moratorium restricts both commercial and non-commercial speech

Strict scrutiny is the proper standard for assessing the moratorium because the law is a content-based restriction on a mixture of commercial and non-commercial

speech.[8] *See Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2228 (2015) ("A law that is content based on its face is subject to strict scrutiny."). Intermediate scrutiny applies when speech "does no more than propose a commercial transaction." *Va. State Bd. of Pharmacy*, 425 U.S. at 776. However, strict scrutiny will apply if the commercial speech is "inextricably intertwined with otherwise fully protected speech." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 795-96 (1988).

Rentberry facilitates a panoply of communications between landlords and tenants. These include not just advertisements, but also direct communication about rentals, maintenance service requests, housing references, and the like. *See* ER 46. Even the algorithms that Rentberry uses to communicate information to users—such as housing and pricing recommendations—enjoy full First Amendment protection. *See Universal Studios v. Corley*, 273 F.3d 429, 445-48 (2d Cir. 2001) (computer code is protected speech). Additionally, Rentberry compiles and disseminates information through its search engine, a form of protected, noncommercial speech. ER 46; *see also Sorrell*, 564 U.S. at 570 ("The creation and dissemination of

[8] Plaintiffs maintain that, under *Sorrell v. IMS Health*, 564 U.S. 552 (2011), strict scrutiny is appropriate also because the moratorium "imposes a burden based on the content of speech and the identity of the speaker." *Sorrell*, 564 U.S. at 567. Nonetheless, this argument is currently foreclosed in this Court's precedent. In *Retail Digital Network v. Prieto*, over Chief Judge Thomas's dissent, this Court held that content-based restrictions on commercial speech need only satisfy intermediate scrutiny. *Retail Digital Network*, 861 F.3d 839, 846 (9th Cir. 2017); *id.* at 851 (Thomas, C.J., dissenting). Wysingle and Rentberry therefore preserve their argument over the proper reading of *Sorrell* for later proceedings.

information are speech within the meaning of the First Amendment."); *Langdon v. Google*, 474 F. Supp. 2d 622, 629-30 (D. Del. 2007) (search engine results are compilations of information enjoying First Amendment protection); *Publius v. Boyer-Vine*, 237 F. Supp. 3d 997, 1008 (E.D. Cal. 2017) ("As the owner of Northeastshooters.com, Hoskins has a First Amendment right to distribute and facilitate protected speech on the site."). Wysingle wishes to engage in this array of speech facilitated by Rentberry and prohibited by the moratorium. Thus, strict scrutiny should apply.

c. The moratorium cannot satisfy intermediate scrutiny

In any case, the moratorium cannot even survive the more forgiving test for commercial speech restrictions. The City proffers three abstract rationales for the moratorium, all based on giving the City time (1) *to study* whether rental bidding platforms comply with local law; (2) *to study* the impact of rental bidding platforms on the Seattle housing market; and (3) to give the City time to create a regulatory framework *if necessary* before the use of these platforms proliferate. In essence, the City's approach is to ban first and gather evidence later. The First Amendment does not allow that kind of preemptive strike against speech.

Courts employ the four-part *Central Hudson* test when analyzing commercial speech restrictions. *See Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980). The test asks (1)

whether the speech is related to lawful activity and is not deceptive; (2) whether the government interest at stake is substantial; (3) whether the speech restriction "directly and materially" serves that interest; and (4) whether the restriction is "no more extensive than necessary." *Id*.

i. The moratorium does not target misleading speech or speech related to unlawful activity

The first inquiry is a threshold question to determine whether the restricted speech merits First Amendment protection. *World Wide Rush, LLC v. City of Los Angeles*, 606 F.3d 676, 684 (9th Cir. 2010). If the restricted speech is non-deceptive and does not propose an unlawful transaction, then the government bears the burden of satisfying the other three steps. *Valle Del Sol, Inc. v. Whiting*, 709 F.3d 808, 816 (9th Cir. 2013).

Rental bidding is not deceptive and does not propose an unlawful transaction, and the City did not argue otherwise below. ER 65. The Ordinance did raise a concern that rental bidding might not comply with local laws, but the City Council has made no finding to that effect. Instead, the City has insisted in the original moratorium and the renewed one that "it is unclear whether the structure and operation of these new services comply with the City's code." ER 36; Supp. App. 004. Indeed, a driving purpose behind the Ordinance is to study whether the speech at issue is lawful. Yet the report issued in July does not draw any clear conclusion as to whether the platforms violate the code either. *See* Supp. App. 013-024. These

speculative and inconclusive worries cannot strip the targeted speech of First Amendment protection.

The only specific law cited by the Ordinance as possibly in tension with rental bidding is the first-in-time rule, codified at Section 14.08 of the Seattle Municipal Code. First-in-time requires landlords to rent to the first qualified applicant. That rule, however, was struck down as unconstitutional by the King County Superior Court in 2018, which held the first-in-time rule was an uncompensated taking for private use and that it violated landlords' due-process and free-speech rights. *See* ER 23-32. The Supreme Court of Washington accepted review of that decision and heard oral argument in June 2019. Unless the Supreme Court reverses, the first-in-time rule is not in effect and cannot support the moratorium. Even if it were in effect, the City has made no conclusion as to whether first-in-time, or any other law for that matter, forbids bidding—the City's study instead seeks to flip the burden of proof by recommending that the moratorium remain in effect until Rentberry proves that its services comply with the law.

ii. Suspending speech as a preemptive strike while the City investigates whether the speech is harmful does not directly advance the government's interests

Commercial speech restrictions must "directly advance" the government's substantial interest. *Central Hudson*, 447 U.S. at 564. There are two primary reasons the City cannot satisfy this step: (1) the City has no conclusive evidence that rental

bidding platforms are harmful or unlawful; and (2) the moratorium does not advance the City's interest in studying rental bidding platforms.

1. The City banned speech about pricing without evidence of harm

A speech restriction does not directly advance the government's interests if it swipes at speculative harms.[9] "The First Amendment requires a more careful assessment and characterization of an evil" before imposing a speech restriction. *U.S. v. Playboy Entertainment Grp., Inc.*, 529 U.S. 803, 819 (2000). When government restricts speech to "prevent anticipated harms, it must do more than simply 'posit the existence of the disease to be cured.'" *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 664 (1994) (quoting *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1455 (D.C. Cir. 1985)). Even under intermediate scrutiny, the City's fear must find substance in evidence that "the harms it recites are real" rather than "*mere* speculation and conjecture." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001) (quoting *Greater New Orleans Broadcasting Ass'n*, 527 U.S. at 188). This demand for concrete evidence is not satisfied by "anecdotal evidence and educated guesses." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490 (1995).

[9] The Supreme Court considers the speculative nature of an alleged harm under the direct-advancement step of *Central Hudson*. *See, e.g.*, *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 188 (1999).

Just as courts demand concrete evidence of harm, they also view prophylactic speech restrictions with extreme skepticism. The Supreme Court has consistently frowned upon "preventative rules in the First Amendment context." *Edenfield*, 507 U.S at 777. In *Edenfield*, Florida tried to defend its solicitation ban as a prophylactic rule that helped diminish risk of fraud. *Id.* at 768. The Court rejected this approach: "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Id. at* 777 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

Here, the City candidly admitted in the text of both the initial and the new moratorium that it did not know whether bidding would violate housing regulations or inflate housing costs. The City stated that "it is unclear" whether the rental bidding websites violate local ordinances and likewise "uncertain whether and how these services impact Seattle's rental housing market." ER 36; Supp. App. 004. And it remains unclear more than a year later, despite the City's study of the issue. It is far from obvious that bidding would inflate prices in Seattle's housing market, given that bidders can bid below a landlord's asking price, and sellers at auction customarily set the asking price below the expected sale price. *See Coalition for Icann Transparency Inc. v. Verisign, Inc.*, 464 F. Supp. 2d 948, 964 (N.D. Cal. 2006) (rejecting notion that an auction system would have "predictable adverse price effects").

The City's supposed interest in discovering whether a more lasting restriction is necessary is akin to California's speech restriction on the Internet Movie Database, where California candidly admitted that it did not yet have evidence of the harm it feared. *IMDb.com, Inc. v. Becerra*, 257 F. Supp. 3d 1099 (N.D. Cal. 2017). The district court responded: "Restrict speech first and ask questions later, the government seems to say. This ignores the First Amendment's heavy presumptions *against* restricting speech of this kind." *Id. at* 1102 (emphasis in original). So it is with the City here—it imposed a speech burden before discovering the information that it admits it needs to justify regulating rental bidding platforms.

In fact, even after completing its study, the City has come up short of evidence. The Office of Housing's report contains nothing more than further speculation and conjecture. The report declines to draw any conclusions about the legality or impact of rental bidding platforms. The report concedes: "[A]ny effect that rental bidding platforms have on weak or strong housing markets is difficult to disaggregate and attribute directly to rental bidding platforms." Supp. App. 0015.

The report's speculation does not provide the evidence necessary to justify the moratorium. For instance, the report's section on fair housing compliance says that Rentberry "mimics" other services that have been "criticized for allowing racial discrimination," Supp. App. 016, but this conclusory and vague statement offers nothing more than conjecture. Likewise, the report raises a concern about "subsidy

discrimination" if auctioning raises rents, but it only speculates that bidding "*may* be incompatible" with subsidy programs *if* it increases prices or "a rent auction *could* cause a landlord to judge higher rent offers with more weight than other criteria," but the report offers no evidence on either point. Supp. App. 018.

With regard to impact on housing costs, the report notes "the lack of information on the technology" and concludes that a study with a "rigorous methodology" is needed "to draw significant and sound conclusions." Supp. App. 019. The only "evidence" offered with regard to impact on housing costs is a single anecdote from Melbourne, Australia. Supp. App. 020. But the report only notes that rental bidding faced substantial criticism in Melbourne without citing any evidence of the platforms' actual impact. *Id.* This is just one more layer of speculation and conjecture, which the report seems to recognize by refraining from drawing any conclusions about the impact of the technology.

The City had the opportunity to produce all necessary facts at the summary judgment stage, and it did not do so. The City also had a year to produce its study, and it failed to do so. Only after this case was appealed did the City finally release a study, yet that study still relies on speculation and guesswork. The City's routine failure to present even post-hoc evidence that the moratorium is justified cannot possibly qualify as the substantial evidence required to satisfy First Amendment scrutiny. *See United States v. Virginia*, 518 U.S. 515, 533 (1996) ("The justification

must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations . . . .").

The City's study pales when compared to the kind of evidence considered sufficient in other commercial speech cases. In *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995), the Supreme Court upheld a rule barring personal injury attorneys from using direct mail solicitation after the Florida Bar presented a 106-page summary of a two-year study of lawyer advertising, which included statistical and anecdotal evidence "noteworthy for its breadth and detail." *Id.* at 626-27. And in *Turner Broadcasting*, the Supreme Court upheld television must-carry rules because Congress had passed the law "[a]fter hearing years of testimony, and reviewing volumes of documentary evidence and studies offered by both sides." *Turner Broadcasting, Inc. v. FCC*, 520 U.S. 180, 199 (1997).

The care and thoroughness in these cases are a stark contrast to the meager eleven-and-a-half pages offered by the City's year-long study, which contains little more than a single anecdote, with no statistical evidence, and no even-handed review of the evidence on all sides.

2. The moratorium does not facilitate the government studies mandated by the ordinance

A commercial speech restriction must have a "logical connection" between means and end. *Metro Lights, LLC v. City of Los Angeles*, 551 F.3d 898, 905 (9th Cir. 2009). The moratorium lacks that connection. Its primary purpose was to study

the effects and legality of rental bidding platforms. Banning the use of the platforms runs counter to that purpose. As the Office of Housing report recognized, "More information about rental bidding platforms and their effect on the local housing market, landlords, and tenants will not be available unless rental bidding platforms are reinstated." Supp. App. 019.

Moreover, now that the commissioned study is complete, the City's core purpose behind the moratorium no longer exists. Its only remaining interest is a vague rationale mentioned in a city staff memo, namely "to give the City time to create a regulatory framework if necessary before use of such services proliferates." ER 34. This is nothing more than a conclusory, speculative, and circular suggestion that if the City does not regulate rental bidding before it grows, then the consequences could be "significant." ER 65-66. What these "significant" consequences are, the City does not and cannot say (hence the call for a study), and presuming harm to justify a regulatory framework is the kind of circular reasoning that cannot satisfy First Amendment scrutiny.

The City's worry that these platforms will "proliferate" is also overtly speculative—the City does not know whether rental bidding will catch on or whether its proliferation will make a regulatory structure more difficult to impose. Even if the moratorium does make it easier to impose future regulation, "the First Amendment does not permit the State to sacrifice speech for efficiency." *Riley v.*

Nat'l Fed'n of Blind of N.C., Inc., 487 U.S. at 795. The City's reflexive approach to regulation clashes with the fundamental notion "that regulating speech must be a last—not first—resort. Yet here it seems to have been the first strategy the Government thought to try." *Thompson v. Western States Medical Center*, 535 U.S. 357, 373 (2002).

3. The moratorium is underinclusive

A speech regulation also runs afoul of *Central Hudson*'s advancement step if it is underinclusive. *Valle Del Sol*, 709 F.3d at 824. An underinclusive reach "raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 802 (2011).

This problem arises when a regulation reaches only a subset of the speech that causes the alleged harm, such that the regulation fails to achieve its purported goal or makes irrational distinctions between regulated and unregulated speech. *See Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1670 (2015) (A law is underinclusive if it "regulates one aspect of a problem while declining to regulate a different aspect of the problem that affects its stated interest *in a comparable way*."). For example, in *Rubin*, a law prohibiting alcohol content on beer labels to discourage strength wars was underinclusive because it did not prevent ads from displaying alcohol content, did not apply to distilled spirits, and did not bar descriptive terms to

boast about alcohol strength. *Rubin*, 514 U.S. at 488-89. The resulting patchwork scheme "makes no rational sense if the Government's true aim is to suppress strength wars." *Id.* at 488.

The moratorium has a similar flaw: it targets only specific bidding forums. It does not, for example, prohibit a landlord from posting an ad on Craigslist soliciting bids. Nor would it prevent prospective tenants from offering a higher rent to gain a competitive edge. These other bidding activities pose the same alleged concern of impacting housing costs, yet they lack the benefits of transparency offered by bidding sites like Rentberry. As in *Rubin*, the moratorium targets only one forum in which the speech at issue occurs. This myopic focus "makes no rational sense if the Government's true aim" is to address rental bidding. *Rubin*, 514 U.S. at 488.

iii. The moratorium is more extensive than necessary

A commercial speech restriction must be "narrowly tailored to achieve the desired objective." *Lorillard Tobacco*, 533 U.S. at 556. While the commercial speech test does not require the government to adopt the least restrictive means to accomplish its interest, the availability of less restrictive alternatives suggests that a law is more extensive than necessary. *See Rubin*, 514 U.S. at 491 ("We agree that the availability of these options, all of which could advance the Government's asserted interest in a manner less intrusive to respondent's First Amendment rights, indicates that § 205(e)(2) is more extensive than necessary."). To satisfy this prong

of *Central Hudson*, the government carries the burden of demonstrating that less-restrictive alternatives would be insufficient to fulfil the government's purpose. *See Thompson*, 535 U.S. at 373 ("The Government has not offered any reason why these possibilities, alone or in combination, would be insufficient to prevent compounding from occurring on such a scale as to undermine the new drug approval process. Indeed, there is no hint that the Government even considered these or any other alternatives."). For example, in *44 Liquormart, Inc.*, the state banned advertising liquor prices in order to encourage temperance. 517 U.S. at 505. Rhode Island argued that a price advertising ban promoted this goal because the ban would mitigate competition and thereby maintain high prices. *Id.* at 506-7. The Supreme Court, however, held that the ban was more extensive than necessary because less restrictive means to inflate alcohol prices existed—namely increased taxes on alcohol. *Id.* at 507.

Like in *44 Liquormart*, Seattle wants to influence the cost of a product (housing), but the City hopes to reduce rather than inflate that cost. As the Supreme Court noted in *44 Liquormart*, there are many ways to control price for a product that do not involve restricting speech. For example, Seattle could influence housing prices by offering subsidies or other incentives to developers to increase supply or by subsidizing renters below a certain income level. Seattle is already engaged in non-speech-restrictive efforts to lower the cost of housing, such as the Multifamily

Tax Exemption that creates incentives to provide low-income housing. *See* SMC § 5.73. Such alternatives do not restrict speech and offer a more direct route to addressing housing costs. The City carries the burden to demonstrate that such alternatives are insufficient. Yet "there is no hint that the government even considered these or other alternatives." *Thompson*, 535 U.S. at 373. Hence, the moratorium is more extensive than necessary.

CONCLUSION

The moratorium strangles speech in the cradle without any evidence of harm or any attempt to balance the speech interests at stake with the City's interests. The ban therefore fails both strict and intermediate scrutiny. The trial court should be reversed.

DATE: August 16, 2019. Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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s/ ETHAN W. BLEVINS
Ethan W. Blevins

STATEMENT OF RELATED CASES

Plaintiffs-Appellants are not aware of any related cases within the meaning of Circuit Rule 28-2.6.

s/ ETHAN W. BLEVINS
Ethan W. Blevins

Certificate of Compliance for Briefs

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